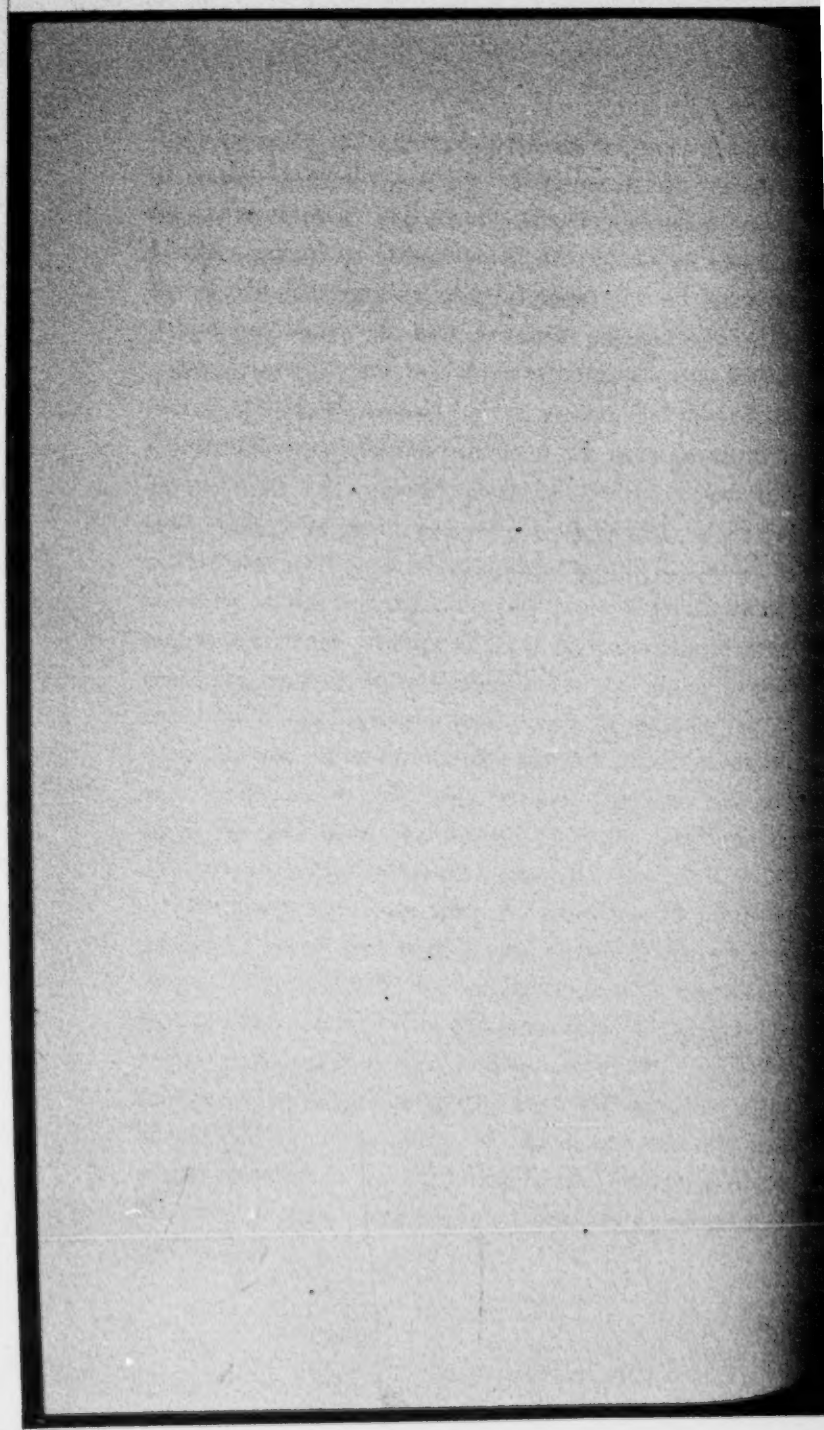

Supreme Court of the United States

OCTOBER TERM 1904

No. 180

THE UNITED STATES, THOMAS SIMPSON, AND WHITE SWAN,

Appellants.

vs.

LINEAS WINANS AND AUDUBON WINANS, partners doing business under the firm name of WINANS BROTHERS,

Respondents.

STATEMENT OF THE CASE.

This is a suit to enjoin the defendants from obstructing certain Indians of the Yakima Nation in the State of Washington in the enjoyment of alleged rights and privileges claimed by them under a treaty between said tribe or nation and the United States government, in force since 1859. The provisions of said treaty material to this suit are these:

"Article I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them. * * *

"Article II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid con-

federated tribes and bands of Indians the tract of land included within the following boundaries: * * * * * *

"All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

"Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time and not included in the reservation above named. * * *

"Article III. And provided that, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highways is secured to them; as also the right in common with citizens of the United States to travel upon all public highways.

"The exclusive right of taking fish in all the streams where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. * * * * *

"Article X. And provided, that there is also reserved and set apart from the land ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the 'Wenatshapam fisheries,' which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations." (12 U. S. Stat. 951.)

Under this treaty said Indians claim an unlimited right to take fish at the usual and customary fishing places on the Columbia River that were in use both before, at, and since said treaty; and also claim the right to erect temporary buildings for drying and curing fish, and for the habitation of such Indians during each fishing season, to the same extent as if such rights and privileges were especially conferred and granted by the sovereign power; and also, that the defendants' claim of exclusive ownership and control of the lands bordering on the Columbia River at such fishing places, under United States patents, and to the shore lands abutting thereon, between high and low-water mark, by grant from the State of Washington, and their claim of the right to operate fish wheels thereat, under license from the state, must be subordinate to such treaty rights and privileges.

Respondents contend that said treaty provisions conferred upon the Indians, as to such lands and fishing places, merely such rights and privileges as the citizens of the Territory enjoyed, and such as the citizens of the state have enjoyed since its admission into the Union, and that such rights conferred are subject (1), to the paramount authority and power of Congress; (2) to the laws relating to the disposal of public lands, and (3) to the admission of the State of Washington into the Union on an equality with all other states, which negatives any question of its ultimate power of disposition over its lands between high and low-water mark or of licensing and controlling the manner of catching fish in its navigable streams; they also claim that said treaty provisions were in general terms, applicable to no particular places, and not

sufficiently certain to confer an easement in any particular land or water; and inasmuch as such rights and privileges were to be exercised "in common with the white citizens," whose right to fish are entirely subject to state regulation, those claimed by the Indians could have no greater extent.

The defendants demurred to the bill of complaint on the grounds: (1) that the bill does not make out or state such a case as to entitle complainants to any relief in equity; (2) that the court has no jurisdiction of the subject-matter of the bill nor of the persons of the defendants.

The demurrer was overruled, the court holding that the appearance of the defendants gave a jurisdiction over their persons, and that it had jurisdiction of the subject-matter set out; and also that said treaty of 1859 gave the Indians common rights of fishing, etc., with the citizens of the Territory and the State in the waters of the Columbia River, which should be protected from invasion by the defendants; the court further held, however, that the right of the Indians to erect temporary buildings on any particular spot of ground ceased when the title to that land was transferred from the United States by patent and became vested as private property.

The demurrer having been thus overruled the defendants answered the bill of complaint and upon the issues so joined, a reference to a special examiner was made, and upon the final hearing a decree was rendered upon the evidence produced by the parties, and upon certain stipulations of fact.

ISSUES OF FACT.

Upon the pleadings and the stipulations, the following summary of the issues of fact may be given:

Appellants contend that defendants, Winans Bros., have by threats, intimidation, and force deprived the Yakima Indians, and particularly the plaintiffs Simpson and White Swan, of their said treaty rights and privileges in this: they have driven the Indians away from their said usual and accustomed fishing places; refused to allow them to come thereto and catch fish; torn down and destroyed their temporary houses erected by them on lands near said fishing places for drying and curing fish, and refused to allow them to rebuild; have by threats, force, and actual assault, driven the Indians away from the river and refused to allow them to fish in said places in common with defendants and other citizens, or at all; that defendants have constructed fish wheels in the usual runways of the fish, which catch all the fish and prevent the Indians from taking any; refused to give the Indians free ingress and egress to and from the fishing places in the Columbia River and over their patented lands, or to erect houses thereon for curing fish.

Defendants and appellees claim that the lands were patented to their predecessors in title and that soon after the patenting of said lands, the Indians were interrupted in attempting to exercise said common rights and privileges as to said lands; that since that time the Indians have frequently trespassed upon the lands to the great injury of the defendants, and still continue so to do; that defendants and their grantors

have denied that the Indians have rights under the treaty to fish upon said lands, erect houses or huts thereon for curing and drying fish, or go to the bank of the river to fish and return therefrom, although they have at times permitted them to fish upon said lands; that they have refused to permit them to trespass upon said lands in taking fish; that defendants have placed no obstructions whatever to prevent the Indians from fishing in the river, and have not refused to permit them or prevented them from so doing. That there are many places for many miles above said patented lands and for many miles below, some of which are on vacant public lands, where the Indians can still fish; that the fish wheels of which the appellants complain are all duly licensed by the State of Washington, and are located entirely on said lands of defendant, and do not prevent or exclude said Indians from taking fish at their usual or customary fishing places or catching fish in the runways; that defendants haxe excluded the Indians from such patented lands only where citizens of the State of Washington have no right to go; that in addition to controlling and possessing the lands described in the complaint under grant from patentees of the United States, the defendants have, since the beginning of this suit, acquired the possession and control of the lands between such patented lands and low-water mark of the river from the State of Washington.

The testimony having been taken and reported to the court, such proceedings were had that, on February 23, 1903, the court filed its memorandum decision on the merits. The court said (Abstract, p. 38.):

"After the ruling on the demurrer, the only issue left for determination in this case is as to whether the defendants have interfered, or threatened to interfere, with the rights of the Indians to share in the common right of the public of taking fish from the Columbia River, and I have given careful consideration to the testimony bearing upon this question. I find from the evidence that the defendants have excluded the Indians from their own lands to which a perfect absolute title has been acquired from the United States government by patents, and they have more than once instituted legal proceedings against the Indians for trespassing, and the defendants have placed in the river in front of their lands fishing wheels for which licenses were granted to them by the State of Washington, and they claim the right to operate these fishing wheels, which necessitates the exclusive possession of the space occupied by the wheels. Otherwise, the defendants have not molested the Indians, nor threatened to do so. The Indians are at the present time on an equal footing with citizens of the United States who have not exclusive proprietary rights, and this, it seems to me, is all they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States."

The bill of exceptions (Trans. p. 246) recites that:

"Upon the final hearing and argument of this suit at Seattle, on the 20th day of May, 1903, the following proceedings were had:

"This cause having come on at that time for hearing and final argument upon the merits, the plaintiffs appearing

by Edward E. Cushman, Esq., Assistant United States Attorney for the District of Washington, and the defendants by F. P. Mays, Esq., their attorney, thereupon the defendants offered in evidence in their behalf four certain fish licenses, duly issued and signed by James Crawford, Fish Commissioner for the State of Washington, and numbered respectively licenses A, B, C and D, which said licenses it was mutually agreed by the parties hereto were duly issued by the State of Washington on the dates they respectively bear, to the parties named therein, and that such licenses were held by the defendants, and that the defendants were fishing under them during the time covered by them and at the times of fishing complained of in the plaintiffs' bill of complaint."

Pages 246, 247, and 248 of Transcript set out the fish licenses so issued, each for the year ending March 31, 1896.

"Whereupon, it was agreed that defendants' answer should be deemed amended so as to conform to the proofs and so as to allege that the defendants at the time complained of were duly licensed by the State of Washington to maintain and operate all fish wheels complained of at the points mentioned and where they were located on the land in question; and also that since the commencement of this suit, the State of Washington has sold all the shore lands upon the Columbia River fronting on the premises in question, between said river and the lands patented by the United States to its grantors, and that said defendants had succeeded to and held the state's interest in and to said shore lands where said fish wheels are located. * * * * * Thereupon, the said licenses were received in evidence, marked as aforesaid, and it was ordered

that the said answer * * * be deemed and considered amended as above stated." (Trans. p. 248).

At the close of the defendants' testimony, it was stipulated between the parties that the patented lands in controversy are now owned by Tyler Woodward, of Portland, Oregon, by mesne conveyance from persons who received patents from the government; that said lands are now in the possession of the defendants Winans Bros. under a bond for a deed from said Woodward. (Trans. pp. 227-9, and map, Pltffs. Exhibit A, p. 240).

It was also stipulated that since the beginning of this suit, the defendants have acquired contracts of purchase from the state for the sale of shore lands lying between the patented lands described in the complaint and answer and low-water mark of the Columbia River, and now occupy the same, and that said contracts of sale were duly executed under the laws of Washington for the sale of its shore lands (Trans. p. 229).

Final decree was entered, dismissing the bill May 28, 1903 (Abstract, p. 39), from which the United States appeals, assigning the following errors (Abstract, p. 250):

1. That the Court erred in its order of November 19, 1895, modifying the injunction order theretofore issued (See Abst. p. 20).

2. That the Court further erred in making its final decree herein on May 28, 1903.

3. That the Court erred in its finding and decision contained in said decree that there was no equity in complainants' cause, and adjudging a decree that said cause be dismissed.

4. The Court further erred in its ruling and decision on demurrer, made and filed March 31, 1896.

A temporary injunction was issued on the filing of the bill of complaint, July 11, 1895 (Abstract, p. 15), and this was, pursuant to stipulation, modified on November 19, 1895 (Abstract, p. 20). The only change made by the order of November 19, 1895, modifying the previous injunction order, was that it gave defendants, in common with complainants and the Yakima Indians, the right to fish at said usual and customary places. The first order restrained the defendants from operating their fish wheels; the modified order giving them the right was based upon stipulation signed by William H. Brinker, United States Attorney, and F. P. Mays, solicitor for defendants. As the order was properly made, on the request of all parties, this point cannot be urged by appellants. Even if objectionable, it does not affect the merits. This first assignment of error, therefore, will not be further discussed in this brief.

The other assignments raise substantially the same questions, and will be considered together, as challenging the legal conclusion reached by the Circuit Court, as set out in the opinion hereinbefore quoted (Abstract, p. 38).

THE TESTIMONY.

The testimony is not confined to the single point considered by the Court below in its memorandum decision, but covers all the issues raised by the pleadings. To simplify

respondents' brief discussion of the same, we desire to state that certain incontrovertible facts appear from the testimony:

1. That the Indians of the Yakima Nation, both before and after the said treaty of 1859, were used and accustomed to catch salmon in the Columbia River at the places called by them Wisham and See-Wee-Pam, located at and upon the lands now in the possession and control of the defendants, contained in sections 19 and 30, township 2 north, range 14 east, and section 25, township 2 north, range 13 east.

J. H. Wood, Plffs. 118.

White Swan, Plffs. 52.

Frank P. Taylor, Defts. 158-159.

2. That since the said treaty of 1859, the Indians never claimed an exclusive right to the fishery at said places, but only the right to fish in common with the white citizens.

Wm. Speedies, Pltffs. pp. 106-107-108.

Martin Speedies, Plffts. pp. 108-109.

3. That such fishing places at said fishery were not stationary, but were changeable, depending upon the stage of the water; that the Indians, when engaged in catching fish either with spears or their primitive nets, were compelled to move their stands or stages back with the rise or down with the fall of the waters; that in places the high water extended from 100 to 200 yards from the mark of low water.

Martineau, Plffs. 130.

Whealdon, Defts. p. 190.

L. Winans, p. 201.

Charley Dick, Plffs. p. 57-58.

Thos. Simpson, Plffs. p. 49-50.

Spencer, Plffs. p. 78.

4. That the lands in controversy were patented by the United States government on the following dates:

Lot 5, section 19; lots 1, 2, and 3, section 30, township 2 north, range 14 east, patented to William Taylor. Patent received at land office January 12, 1870.

Lots 4 and 5 of said section 30 were purchased by William Smith; cash entry, August 30, 1864.

Lots 1, 2 and 3, section 25, township 2 north, range 13 east, patented to O. D. Taylor, May 10, 1889.

J. J. O'Kane, Plffs. pp. 142-143.

The date of the erection of the first fencing, and closing of the Indian trails to the river, is left uncertain, but all witnesses agree that during the period the said lands were owned and controlled by O. D. Taylor and Frank Taylor, the right to the exclusive control by the grantees of the United States over the said lands was asserted.

Whealdon, Defts. 189.

F. P. Taylor, Defts. 159.

Sam Tan-a-Washa, Plffs. 80.

White Swan, Plffs. p. 53.

Yow Yowan, Plffs. p. 64.

5. That in 1896, the defendants completed the fence previously built on said patented lands, extending it to the river, and that such fence is now continuous (except where the rim rock near the lower part constitutes part of it), from the upper end of the big eddy (see map on p. 240 of Trans.)

to the upper end of the rapids, thus completely cutting off access by either whites or Indians to the fisheries on said patented lands.

Martineau, Plffs. p. 126.

Charley Dick, Plffs. pp. 55-6.

Thomas Simpson, Plffs. p. 49.

Bill Se-Hi-Sam, Plffs. p. 88, et al.

There is no evidence to show that any fence of defendants or their predecessors was built upon the state or shore land prior to its disposal by the State of Washington, in June, 1896, or that at those precise points there was any shore land. The fence on defendants' lands does not run to the lower wheel. A little below the line between sections 30 and 25, a bluff of rim rock forms the fence to the lower wheel (Audubon Winans, Trans. p. 213). From the Indian village at Wisham, they can go direct to the river, but defendants' land is fenced so that they cannot cross lot 5, section 19, to do so. (Audubon Winans, p. 212.) There never has been any enclosure so as to prevent the Indians reaching the river on the east from the north end of the village (Audubon Winans, p. 213).

That until 1895, and according to the defendants, August, 1896, when the fence was completed, the grantees of the United States, and those claiming patented lands under them, allowed the Indians to fish in the said river from the said patented land, and to go over and across the same for such purpose. This privilege, however, was not granted as lawfully due, but was merely a permission, conditioned upon the Indians not otherwise trespassing upon the lands or interfering with defendants' fish wheels or with the employes engaged in catch-

ing fish in the spaces between the several wheels (Whealdon, Defts. p. 191; Linneus Winans, Trans. p. 202, 206.)

7. That neither the defendants, nor their predecessors, have obstructed, hindered, or prevented the Indians from fishing in the river with boats or otherwise, but that the swift and dangerous current along the lands in controversy renders such form of fishing impossible.

Bill Charley, Plffs. p. 97.

8. That there are many other fishing points along the said river, both above and below Wisham and See-Wee-Pam, to which the Indians and white citizens still have access, principally at Cascades, White Salmon, and Skin (a little below Celilo, on the Washington side), with minor fishing places between them.

Thomas Simpson, Plffs. 48, 49.

Frank P. Taylor, Defts. 152, 153.

Seufert, Defts. 170, 172, 173.

9. That it is only since 1896 that the defendants have ceased to permit the Indians to go on said patented lands and notified them to refrain from trespassing. That prior to 1896, some Indians were occasionally ordered off and some were permitted to fish upon condition of orderly conduct and refraining from acts of trespass (Whealdon, Defts. p. 191; Linneus Winans, Defts. p. 202).

10. That the Indian houses, huts, or storehouses on the said patented lands at See-Wee-Pam were torn down as the result of trespass proceedings brought by O. D. Taylor, one of the defendants' predecessors, with which acts defendants have nothing to do (Whealdon, Defts. p. 189); that the

houses in the Indian village at Wisham still stand and are not upon the said patented lands (Yow Yowan, Plffs. 64, 65); and there is no testimony that defendants have ever in any way interfered with the Indians pasturing their horses, erecting their houses, or with their conduct in any way on the lands outside of said patented lands, and have erected no fences thereupon.

11. That defendants claimed the right to exclude whites as well as Indians from said patented lands and fisheries two and even four years before the taking of testimony which was in 1897 (William Speedies, pp. 106-8; Martin Speedies, pp. 108-9).

12. The principal food of the Indians in early times was fish, roots, and berries, with occasional deer (Martineau, Plffs. 125; T-Wash-Pam, Plffs. 104-106.) The reservation Indians at the present time engage in farming and sometimes bring flour from Yakima to the fisheries to exchange for fish caught by the Indians there (Linneus Winans, Defts. 204, 206.) The Indians at the fisheries claim that they, as members of the Wisham tribe, are entitled to fish at that fishery, and for that reason refrain from going to the fishery at Skin, which they say belongs to another tribe of Indians (Sam Tan-a-Washa, Plffs. 82.) All of these fisheries, however, are properly included within the meaning of the treaty stipulation in controversy. It appears from the evidence that the Indians resident at the fisheries, many of whom own lands near the river, are, according to the testimony of Mr. Seufert, greater "monopolists" than the whites (Seufert, Defts. p. 173).

13. The current of the river past the fishing places on said patented lands is very swift; at the place where the old Indian village was at See-Wee-Pam not to exceed 200 feet wide. At other places, it is likewise swift, swirling, and so dangerous that fishing cannot be conducted from boats and that salmon, in traveling toward the spawning grounds, hug the shore, the current of water near it constituting the fishing station. The fish wheels can only be built at places where there is a suitable, shelving bank for support (F. A. Seufert, Defts. 171), and their gear is so adjusted that they rise or fall with the rise or fall of the waters (Audubon Winans, Defts. 214). At times of very high water, the access to the wheels is rendered impossible, and the shore line is inland 100 yards or 200 yards therefrom; at very low water the wheels are out of the water entirely, they being built with a view to fishing at medium stages. The fisheries are from one-half to three-quarters of a mile apart; at Wisham they overflow at high water. They do not overflow at See-Wee-Pam save at extreme high water. At ordinary high water at See-Wee-Pam the fishing is better than at low water; the Indians fished there when the water came up (Test. Charley Dick, Trans. p. 57.) Wisham was the low water fishery; See-Wee-Pam the high water fishery (Charley Dick, p. 58). At some places the shore recedes from the rock 100 yards or so; at other places it is perpendicular. When the water is high, it extends back over the shore land in some places, in others, not (W. D. Gilmore, Defts. p. 195; Whealdon, Defts. p. 190). At the maximum height of the water, the Indians could not get to any of the wheels (Linneus Winans, p. 201).

14. That salmon die after reaching the spawning grounds, having taken no food since leaving still water and being bruised by stones and attacked by parasites and disease while thus weakened. The steelhead (trout), however, returns to the sea after spawning (H. D. McGuire, Defts. 219, 220).

16. That the wheels do not stop the running of the fish near the shore nor catch all of them. That there remains good net fishing between the wheels at all stages of the water, and spear fishing is possible at low water. That prior to 1896, both defendants' employes and the Indians so fished at the places between the wheels (Linneus Winans, Defts. p. 202; Charley Dick, Plffs, pp. 57-9; Martin Speedies, Plffs. 80; Louis T. Barin, Defts. p. 224).

17. The defendants' four fish wheels are located upon the shore land so granted by the state, and are situated as follows:

1. The scow wheel at the extreme upper end of the rapids, at the easterly point of lot 5, section 19, township 2 north, range 14 east.

2. From one-half to three-quarters of a mile southwest of the scow wheel is the first stationary wheel, where lots 2, 3, and 4, section 30, corner on the river.

3. There is another stationary wheel a quarter of a mile southwest, at the lower corner of lot 5, section 30, township 2 north, range 14 east.

4. The last stationary wheel, referred to in the testimony as the "lower wheel," is still another quarter of a mile down stream, to the southwest, and is located at lot 1, section 25, township 2 north, range 13 east.

Linneus Winans, Defts. p. 200.

Map, p. 240, Transcript.

Winans Brothers built the fish wheels about 1889, at a cost of some $15,000.00.

Linneus Winans, Defts., p. 199, 200.

Audubon Winans, Defts. p. 208.

Thomas Simpson, Plffs. p. 48.

All of these wheels, during the times complained of, were operated under license from the state (Trans. p. 246), and the contracts for the sale of the said shore land were executed pursuant to the laws of Washington, authorizing the sai thereof (Trans. p. 229, 248).

18. That in early times and before the establishment of the fish wheels, the Indians lived at said fisheries in greater numbers than at present. They at times congregated there to the number of several hundred and engaged in feasting, fishing and horse racing. Of recent years those living on the reservation have come in much less number and there are but few who live near the fisheries continuously.

Martineau, Plffs. 125.

Wood, Plffs. 118.

19. That 80 per cent of the salmon run is caught the first 50 miles up the Columbia River; that over one-half of the salmon catch of the upper river is caught by the fish wheels; that the fish wheels probably catch 5 per cent of the net catch of the river during a given season (Hollister D. McGuire, Defts. p. 220. Mr. McGuire was at that time the fish commissioner of the State of Oregon).

20. The fish wheel is a proper method of catching salmon

and is no more detrimental to the salmon industry than any other appliances which would catch an equal number of fish (McGuire, Defts. 221).

CONFLICTING TESTIMONY.

As each side endeavored to elicit all possible information, the evidence presents little conflict on material matters. A number of old Indians (Bill Charley, p. 91; White Swan, p. 51; Moses Strong, 60, 61; White Salmon Charley, 72) testified as to their understanding of the treaty as originally made in 1855 between the Yakimas and Governor Stevens and General Palmer, representing the government. As the evidence was taken subject to all proper legal objections (Trans. p. 44), respondents now urge that this testimony was wholly incompetent, as tending to vary the plain stipulations of the treaty, and hence cannot be considered by this court.

Apart from the sidelight it throws on the case, testimony as to the habits of the salmon, its importance as an Indian food, the number of Indians now resorting to the fisheries, and the availability of the other fisheries on the Columbia, has but little significance.

There is practically no controversy except over the effect of fish wheels in destroying net and spear fishing between and above them. It may be conceded that the testimony shows—indeed, it is self-evident—that every fish caught by a wheel diminishes the chances of net fishing, and that every fish caught by a net lessens the success of wheel fishing. But

respondents contend that net fishing, both between and above the wheels, has not been destroyed by them (Linneus Winans, Defts. p. 202, Trans.) Until 1896 the Indians were allowed to fish above the lower wheels (Charley Dick, Plffs. pp. 57-9; Martin Speedies, Plffs. p. 112; Sam Tan-a-Washa, Plffs. p. 80; Louis T. Barin, Defts. p. 224; Whealdon, Defts. p. 191; Linneus Winans, Defts. p. 202).

The wheels do not destroy the fishing places (Frank P. Taylor, Defts. p. 160-1); nor the fishing (L. Winans, Defts. p. 202; F. A. Seufert, Defts. p. 172 and 180; Louis T. Barin, Defts. p. 224).

The wheels are built to run at medium stages of the water; hence at very high and very low water do not interfere with the catch by other methods (L. Winans, Defts. pp. 200-1).

The defendants did allow the Indians to fish between the wheels, but gave them to understand it was only permission and not as a right (L. Winans, pp. 202-4).

The evidence plainly shows that but for the fencing up of the land, thus closing access to the fisheries, the Indians would have made no complaint as to the wheels (Sam Tan-a-Washa, p. 81).

POINTS AND AUTHORITIES.

I.

Upon the acquisition of the original Oregon territory now including Oregon, Washington, and parts of other states, the United States became invested with the fee of all the

lands and waters included therein. The "Indian title" as against the United States was merely a right to perpetual occupancy of the land, with the privilege of using it as the Indians saw fit, until such right of occupancy had been surrendered to the government; and the Indian title to the reservations was of no higher character.

U. S. v. Alaska Packers' Ass'n, 79 Fed. 157.
Spalding v. Chandler, 160 U. S. 394, 407 (16 Sup. Ct. Rep. 360).

II.

The Indian title, even to the lands included in their reservation, is subject to the paramount control and power of Congress in the enactment of laws for the sale and disposal of the public lands.

U. S. v. Alaska Packers' Ass'n, 79 Fed. 157.
Spalding v. Chandler, 160 U. S. 394, 407 (16 Sup. Ct. Rep. 360).
U. S. v. Winans, 73 Fed. 72.
Missouri K. & T. Ry. Co. v. Roberts, 152 U. S. 114 (14 Sup. Ct. Rep. 496).

III.

Under the treaty of 1859, the Indians neither reserved nor did they acquire a title by occupancy to the lands bordering their usual and customary fishing grounds. They acquired merely an executory license or privilege, applying to no certain and defined places, and revocable at will of the United States, to fish, hunt, and build temporary houses upon public lands, in common with white citizens, upon whom the law has conferred no title by occupancy whatever.

U. S. v. Winans, 73 Fed. 72.
U. S. v. Alaska Packers' Ass'n, 79 Fed. 152.
Ward v. Race Horse, 163 U. S. 504 (16 Sup. Ct. Rep. 1076).

IV.

The said treaty of 1859 imposed no restraint upon the power of the United States to sell the lands in controversy, and such a sale under the settled policy of the government,

was a result naturally to come from the advance of the white settlements along the river, and it cannot be assumed that the government intended by general expressions in the treaty to tie up the development of the fishing industry through a long stretch of the waters of the Columbia.

Ward v. Race Horse, 163 U. S. 504 (16 Sup. Ct. Rep. 1078).

V.

The grant of the lands bordering the Columbia River at such fishing places deprived the white citizens of all rights to go over, across, or upon them for the purpose of fishing or erecting buildings or other purposes, and the Indian rights being of no higher nature were likewise revoked and extinguished.

Ward v. Race Horse, supra.
U. S. v. Winans, supra.
The James G. Swan, 50 Fed. 108.
U. S. v. Alaska Packers' Ass'n, 79 Fed. 157.

VI.

Upon the admission of the State of Washington into the federal Union, "upon an equal footing with the original states," she became possessed, as an inseparable incident to her dominion, and sovereignty, of all the rights as to sale of the shore lands on navigable rivers, and the regulation and control of fishing therein, that belonged to the original states.

Shively v. Bowlby, 14 Sup. Ct. Rep. 567, 569, 152 U. S. 1.
Hardin v. Jordan, 140 U. S. 371 (11 Sup. Ct. Rep. 808, 838).

VII.

The title to the shore and lands under water is incidental to the sovereignty of a state,—a portion of the royalties belonging thereto,—and held in trust for the public purposes of navigation and fishery, and cannot be retained or granted out to individuals by the United States; and it depends upon the law of such state to determine to what extent the state has prerogatives of ownership. Control and regulation shall

be exercised subject only to the paramount authority of Congress with regard to public navigation and commerce.

Hardin v. Jordan, 140 U. S. 371 (11 Sup. Ct. Rep. 808, 838).

Shively v. Bowlby, 14 Sup. Ct. Rep. 565, 152 U. S. 1.

VIII.

Evidence of Indians present at the time of the execution of the treaty between the representatives of the United States government and the federated bands of Indians known as the Yakima Nation in 1855 is incompetent and inadmissible when such evidence would tend to vary the plain stipulations of the treaty.

Anderson v. Lewis, 1 Freem. Ch. (Miss.), 178.

Little v. Wilson, 32 Me. 214.

IX.

Where rights of fishing and hunting on the then vacant public lands of the United States were reserved to the whites and Indians "in common," both whites and Indians could use such implements and methods of fishing and hunting in the exercise of their common rights as they saw fit, and the use of fish wheels by the whites in the customary runways of the fish which did not exclude the Indians from fishing elsewhere, would not deprive the Indians of their common right.

ARGUMENT.

1. Before taking up the main legal points upon which respondents believe this case turns, they desire to discuss briefly the questions of fact involved. If this case were to be decided upon questions of fact raised by the pleadings, exclusive of the stipulated amendments, the plaintiffs would fail to make out a case justifying relief. The testimony was taken upon all of the issues, and defendants introduced their evidence upon the theory that, if it should be held that

the Yakima Indians have an unlimited right of fishery in common with the white citizens, at the places in controversy, nevertheless, the operation of fish wheels by defendants, in no way deprived the Indians of their said treaty rights; and the evidence to this effect is conclusive in respondents' favor.

It is not complained that defendants operated said fish wheels in a wrongful or unlawful manner. It does not appear that the wheels killed or materially injured *any passing fish.* It does appear that they are as proper as any other appliance, net or trap which would catch an equal number of fish. In the absence of statutory regulation, either whites or Indians could use any implement or appliance they saw fit, subject only to the restriction that they must not prevent others from doing likewise. In 1855, the Indians were accustomed to fish with spears and crude nets. Inasmuch as white men, even at that time, had several methods of fishing, it can no more be claimed that the whites should discard fish wheels and only use nets and spears, than that the reservation of a hunting right, common to both whites and Indians, should constrain them to discard the firearms of civilization and return to the bow, arrow and flint knife of savagery. The fishing right was in common, and aside from the right of the state to license fish wheels, the wheel fishing is one of the civilized man's methods, as legitimate as the substitution of the modern combined harvester for the ancient sickle and flail. Of this the Indians cannot lawfully complain, and they did not complain until excluded from access over the patented lands to the bank of the river. There is nothing in the evidence to show that the Indians could get to said fishing places

otherwise than across said patented lands. Hence, the exclusion of the Indians from the fishing grounds, by preventing them from trespassing, violated no right. If it was impossible for the Indians to go to the fisheries on the shore lands and engage in fishing without crossing the lands of defendants, that is no fault of defendants, and they are neither legally nor morally responsible for that state of things. The *condition of the river*, the swift and swirling nature of the stream in front of said patented lands, prevented fishing from boats, and if the Indians could not fish in the stream at that point, they, like the white citizens of the state can go elsewhere, where the government has not seen fit to convey the lands adjoining the river to private parties, or where they have access to the river without trespassing on private lands.

Another feature that the evidence discloses, is that the places where fish can be caught, along defendants' lands, are not stationary and fixed, but that those fishing there have to move their fishing stands back to the higher lands with the rising, and down again with the falling waters. There are places where, at high water, the fishing would have to be conducted two hundred yards inland from low-water mark. Presumably the same condition of affairs prevails at White Salmon, Cascades, Skin, Celilo, and the other fishing places along the river to which Indians of the Yakima tribe were accustomed to resort. The natural conditions at and surrounding the fishing grounds, the impossibility of granting unlimited and perpetual fishing rights at these places without practically granting ownership or dominion over a considerable space of surrounding territory, lead to the conclusion

that the grant of such unlimited, undefined fishing rights, incapable of exact boundary, was not intended.

But, however the case might have stood under the issues originally presented by the bill and answer, a new element was injected into it by the amendments setting up the fact that defendants operated such fish wheels under license from the state, and also that since the beginning of this suit, they have acquired from the state the shore lands. Respondents claim that these undisputed facts themselves establish their right to absolutely exclude the Indians from the said shore lands and from fishing at the places referred to at any time or in any manner. Hence, whatever the question was before such sale of the shore lands, as the matter stands now, the defendants have complete title and dominion, both from the United States and from the State of Washington, over all of the patented lands and fishing places in controversy, and unless the treaty of 1859 can be construed as granting an unlimited easement to the said Indians to so go upon said lands, erect buildings, pasture horses, and fish in the river from the said shore lands, there is absolutely nothing either in the laws regulating the disposal of public lands in the United States, the enabling act, providing for the admission of Washington into the Union, or in the instruments conveying the title, which in any way limits, controls, or encumbers the full efficiency of the fee simple titles so conveyed.

2. Upon the acquisition of the original Oregon territory, the United States received the fee of all lands and waters included therein.

"The Indian title, as against the United States, was merely a title and right to the perpetual occupancy of the land, with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to-wit: the right to possess and occupy the lands for the uses and purposes designated."

Spalding v. Chandler, 160 U. S. 394 (16 Sup. Ct. Rep. 360).

By the treaty of 1859 the Yakima nation effectually surrendered its "Indian title" of occupancy to the United States. No claim is made that under the treaty they reserved not only their "Indian title" to the reservation, but also their "Indian title" to the unoccupied and vacant lands of the United States whereon they were permitted to hunt, pick berries, pasture horses and erect temporary buildings for curing fish, or to their usual and accustomed fishing places. It might as well be contended that they reserved such right or title to public highways, which they were allowed to travel in common with white citizens.

But, even if such title was reserved, it was subject to the paramount control and power of Congress to invade the sanctity of the reservation, even against the consent of the Indians, for if a grant necessarily includes the possession of a portion of a reservation, the effect of the grant is to extinguish so much of the reserve as was embraced in the grant.

U. S. v. Alaska Packers' Ass'n, 79 Fed. 157.

Spalding v. Chandler, supra.

U. S. v. Winans, 73 Fed. 72.

Missouri K. & T. Co. v. Roberts, 152 U. S. 114 (14 Sup. Ct. Rep. 496).

Consequently, the patenting of the lands described in the complaint and answer to the predecessors of defendants, conveying the full legal and equitable title, effectually disposed of whatever Indian claims existed as to the patented lands.

Under the treaty of 1859, the Indians acquired a mere executory license or privilege, revocable at will of the United States, to fish, hunt, pasture horses, gather berries and build temporary houses for curing fish, in common with the white citizens, on vacant public lands. The white citizens have always had such rights, but the law conferred on them no title by occupancy whatever. If we apply the maxim—"things equal to the same thing are equal to each other," the Indians acquired only the rights conceded to belong to white citizens, to hunt and make temporary dwellings on vacant and unoccupied land, and to fish in navigable waters (U. S. v. Winans, 73 Fed. 72). The white citizens never had a right to trespass on patented lands in the exercise of their undoubted common right of fishery in navigable waters, and the Indians could have no greater right.

"Above high-water mark the soil is the exclusive property of the riparian proprietor, and the public have no right to go upon it for the purpose of fishing, or drawing seines upon it, or of doing any other act that pertains to the public right of fishing. Such rights belong exclusively to the riparian proprietors."

13 Am. & Eng. Ency. of Law (2d ed.), pp. 565-566 and cases cited.

Under the treaty, the whites could not trespass on the Indians' exclusive rights in their reservation, and it could not have been intended that the Indians should have greater rights

in the white man's "reservation,"—the lands ceded to the government, than the white man himself had.

But respondents contend that the Indian rights and privileges in controversy, were but licenses, revocable at will.

"A license is technically an authority given to do some one act, or series of acts, on the land of another, without possessing any estate in the land."
Cook v. Stearns, 11 Mass. 533.

The treaty provides, Art. III.—"The *exclusive* right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians * * *." This is followed by the provision,—"as also the right of taking fish at all usual and accustomed places, in *common with citizens of the territory*, and of erecting *temporary* buildings for curing them; together with the privilege of hunting, gathering roots and berries and pasturing their horses and cattle upon open and unclaimed land."

As said by Judge Hanford, U. S. v. Winans, 73 Fed. 74, "The enumeration of other rights secured to the Indians by express words negatives any possible presumption of rights by mere implication; for the rule is *expressio unius est exclusio alterius.*"

Article II secures to the Indians the right *in common* with citizens of the United States, to travel upon all public highways. Do appellants contend that this deprived the state of the power to alter or abolish highways? If the citizen could not complain of such action by the state, could the Indians complain?

Against the contention that said treaty conferred an easement on the Indians for the purposes indicated, we merely say that an *easement involves an interest in land*,—a license, revocable at will, does not. Here no interest in land is conferred. There are no words used which could possibly create such an interest in a contract between private parties, first, because of the indefiniteness of the stipulation as to the places intended to be subjected to the easement, and second, because the rights and privileges granted were merely personal to the members of the tribe, unassignable, and have to do with acts to be done by them, and not with land. They are given the right to erect *temporary* buildings for curing fish. This clearly indicates that the Indians' rights were temporary, and excludes the idea of permanent occupancy or of an easement.

If, as respondents contend, said stipulations conferred only a license to fish, with right to erect temporary structures only, and hence conveyed no interest in said patented lands, the grant of the same by the United States, and the grant of the shore land by the state, operated as a revocation of said license, as to the lands so granted.

In Eisenbach v. Hatfield, 2 Wash. 237, the Supreme Court of Washington held that the state has full power to dispose of its tide lands, subject only to the restrictions imposed by the constitution of the state and of the United States; that the act of the territorial legislature permitting the riparian owners to build wharves in front of their premises, was but an executory license, and, until availed of, was revocable, and that the state constitution and subsequent laws extinguished the license.

To the same effect is Shively v. Bowlby, 14 Sup. Ct. Rep. 568, 152 U. S. 1.

If the treaty in question had given the Indians a right to erect permanent structures, and they had exercised this right, it might be contended that a subsequent sale by the state or nation would be subject to it. But the rights conferred were merely personal, executory and floating,—could not, by the terms of the treaty, become executed, vested rights, and hence the patents from the general government, the provisions in the state constitution and its laws thereunder, and the state's grant of the shore lands, effectually extinguished such rights.

Upon the admission of Washington into the federal Union, "upon an equal footing with the original states," she became possessed, as an inseparable incident to her dominion and sovereignty, of all the rights, as to the sale of shore lands on navigable rivers, and the regulation and control of fishing therein, that belonged to the original states, whose dominion and sovereignty in these respects came into being when America severed her connections with the British crown.

Shively v. Bowlby, 14 Sup. Ct. Rep. 567, 569, 152 U. S. 1.

Hardin v. Jordan, 140 U. S. 371 (11 Sup. Ct. Rep. 808-838).

That the right of common fishery by the public in navigable waters is subject to state regulation and control, is nowhere denied, and is a settled principle, both of policy and jurisprudence, in the American scheme of the division of sovereignty between national and state governments. The title to the shore, and the lands under the water, is incidental to

the sovereignty of the state, a portion of the royalties belonging thereto,—and held in trust for purposes of public navigation and fishery, and cannot be retained or granted out to individuals by the United States; and it depends upon the law of such state to determine to what extent the state has prerogatives of ownership. Its control and regulation are subject only to the paramount authority of Congres with regard to public navigation and commerce.

The only cases in which Congress can retain or grant out to individuals such incidents of sovereign power, are those specified in Shively v. Bowlby, 14 Sup. Ct. Rep. 566, where the Supreme Court, per Mr. Justice Gray, said:

We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.

But Congress has never undertaken, by general laws, to dispose of such lands, and the reasons are not far to seek.

As has been seen, by the law of England, the title in fee, or jus privatum, of the king or his grantee, was, in the phrase of Lord Hale, "charged with and subject to that jus publicum which belongs to the king's subjects," or, as he elsewhere puts it, "is clothed and superinduced with a jus publicum, wherein both natives and foreigners in peace with the kingdom are interested by reason of common commerce, trade and intercourse": Harg. Law Tracts, 36, 84. In the words of Chief Justice Taney, "the country" discovered and settled by Englishmen "was held by the king, in his public and regal character, as the representative of the nation, and in trust for them;" and the title and the dominion of the tide waters, and of the soil under them, in each colony, passed by the royal charter to the grantees as "a trust for the common use of

the new community about to be established, and, upon the American revolution, vested absolutely in the people of each state, "for their own common use, subject only to the rights since surrendered by the constitution to the general government": Martin v. Waddell's Lessee, 16 Pet. 367, 409-411. As observed by Mr. Justice Curtis, "This soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights": Smith v. Maryland, 18 How. 71, 74. "The title to the shore and lands under tide water," said Mr. Justice Bradley, "is regarded as incidental to the sovereignty of the state,—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery": Harvin v. Jordan, 140 U. S. 371, 381, 11 Sup. Ct. Rep. 808, 838. And the territories acquired by Congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects; and the title and dominion of the tide waters, and the lands under them, are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, "in trust for the future states": Pollard's Lessees v. Hagan, 3 How. 212, 221, 222; Weber v. Commissioners, 18 Wall. 57, 65; Knight v. Association, 142 U. S. 161, 183, 12 Sup. Ct. 258.

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case of some *international duty or public exigency*, shall be held by the United States *in trust for the future states*, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals, as private property, but shall be held as a whole for the purpose

of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.

The granting to an Indian tribe of an unlimited right of fishery in navigable waters, held in trust for the people of the future State of Washington by the United States, would not be "in case of some international duty or public exigency." But, if it be conceded that such an unlimited right of fishery was or could be granted by the said treaty, it is elementary that an act of Congress may supersede and repeal a treaty.

Fong Yue Ting, v. U. S., 149 U. S. 698, 13 Sup. Ct. Rep. 1016.

The Cherokee Tobacco, 11 Wall. 621.

Construing the provision in the treaty of February 24, 1869, with the Bannock tribe of Indians, "that they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting district, the Supreme Court, through Mr. Justice White, said:

"The act which admitted Wyoming into the Union, as we have said, expressly declared that that state should have all the powers of the other states of the Union, and made no reservations whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty, if it was so construed as to allow the Indians to seek out every unoccupied piece of government land, and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union was merely declaratory of the general rule."

Ward v. Race Horse, 16 Sup. Ct. Rep. 1078.

To suppose that the treaty with the Yakimas, instead of creating a mere license, temporary in character, liable to destruction if the needs of commerce and civilization required, created permanent easements in the lands and fishing grounds covering a large part of the course of the upper Columbia river, would render necessary the assumption "that Congress, while preparing the way, by the treaty, for new settlements and new states, yet created a provision, not only detrimental to their future well being, but also irreconcilably in conflict with the powers of the states already existing."

Ward v. Race Horse, supra.

The constitution of Washington provides, Article XVII: "The State of Washington asserts its ownership to the beds and shores of all navigable waters in this state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; provided that this section shall not be so construed as to debar any person from asserting his claim to vested rights in the courts of the state."

Pursuant to laws passed in accordance with said provision, the state sold the shore lands involved herein to defendants (Trans. p. 229), and the fish wheels were operated by defendants under licenses issued pursuant to law (Trans. p. 246, 247 and 248).

The state having determined, both by said constitutional provisions, and its laws for licensing fish wheels and the sale of shore lands, to what extent its prerogatives in said respects shall be exercised, appellants cannot complain.

In the court below, testimony was given by a number of old Indians to the effect that in the discussions preceding

their adoption of the treaty of 1859, it was understood that they were to have their accustomed fisheries as their own forever (White Salmon Charley, p. 72, Trans.). As testimony of this character is in direct conflict with the treaty stipulations, it is clearly incompetent and inadmissible.

A treaty is a contract, and its provisions can no more be varied by parol evidence of the prior intentions of the parties, than can the terms of a written instrument between private parties.

In Anderson v. Lewis, 1 Freem. Ch. (Miss.) 178, construing a treaty between the government and the Chickasaw Nation, reserving to each male and female of the tribe a section of land within the territory, the court said:

"When individual rights vest under a treaty, its meaning, in reference to them, is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts. It must receive such construction as will best effectuate the intention."
Citing Vattel, Ch. 17.

Construing the treaty of Washington (1842), which asserted that part of the boundary line between the United States and New Brunswick was never ascertained and determined, the Supreme Court of Maine, in Little v. Wilson, 32 Me. 214, held that where the language used in a treaty clearly declares a fact, or grants, confirms or defines a right, it must be effectual, even if found to be inconsistent with the purposes disclosed by correspondence which preceded it, and said:

"A judicial tribunal would not be authorized to limit the plain and unrestricted language of a treaty to the accomplishment only of the particular purposes which induced the parties to introduce each article. The intention is to be

ascertained rather from the ambiguous language finally agreed upon, than from the anterior correspondence."

There are no ambiguous terms in the treaty of 1859. The rights granted to the Indians were to fish and hunt in common with the white citizens on vacant and unoccupied public lands; the grant of the right to erect temporary structures excluded the idea of permanence, and prevented them from acquiring vested rights, such as a riparian owner acquired by building a wharf into the stream in front of his lands.

But, apart from the rule rendering such testimony incompetent, the historical facts, contemporaneous with the signing and ratification of the treaty, plainly support respondents' construction. In 1855 the white settlers were advancing in fast augmenting numbers to the valleys of the Willamette and Columbia. Their clearings could be seen in every direction. It was manifest both to the Indians and to the government, that the Oregon country was destined to be the home of an energetic, enlightened people, who would surely leave undeveloped no hidden resources of land, sea or stream. The Indians had already felt the might of the whites and knew both their intellectual and physical superiority. Almost unseen by the government at Washington, the hardy pioneers, with rifles, families and a few of the seeds and implements of husbandry, had "trekked" across the wilderness, and during the time of joint occupation of the country, with Great Britain, had established a provisional government, based upon the common law, the American constitution and the ordinance of 1787. When the joint occupation ended, and the title of the United States to the country became single, they found

it in the firm grasp of law and order, with the foundations of church and state and commerce already established. It cannot be supposed that at such a time, while the last march of our state builders was going on, our government sanctioned a treaty deliberately intended to curtail the rights of the future state, to deprive it of equality with the original states, to repudiate its trust obligation to transfer the shore lands of navigable waters and the right to control and regulate fishing therein, unimpaired to the people of the state, and to limit the future development of their fishing industries.

Wherefore respondents ask that the decree of the Circuit Court be affirmed.

Respectfully submitted.

CHAS. H. CAREY, F. P. MAYS, and

HUNTINGTON & WILSON,

Solicitors for Defendants and Respondents.